

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

LILYBLAD PETROLEUM, INC.,)

Appellant,)

v.)

State of Washington, DEPARTMENT)
OF ECOLOGY,)

Respondent.)

PCHB No. 91-19

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

On January 24, 1991, Lilyblad Petroleum, Inc., filed an appeal contesting the Department of Ecology's setting an NPDES permit annual fee of \$10,000 under the category "Industrial Facility, Organic Chemicals Manufacturing, Aliphatic."

The matter concluded on April 19, 1991, with the parties' filing closing argument and proposed findings. The hearing on the merits was held on April 3-5, 1991, in Lacey, Washington. Present for the Pollution Control Hearings Board were Chair Judith Bendor, presiding, and Member Harold S. Zimmerman. Appellant Lilyblad was represented by Attorney Guy J. Sternal. Respondent Department of Ecology ("Ecology") was represented by Assistant Attorney General Lucy E. Phillips. Court reporter Bibiana Carter with Gene S. Barker & Assocs. (Olympia) took the proceedings on April 3 and 5, 1991. Court reporter Diane Hemrich with Vernon & Associates (Tacoma) took the April 4, 1991 proceeding.

Opening statements were made. Witnesses were sworn and testified. Exhibits were admitted and examined. Closing argument and

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1 proposed findings of fact, conclusions of law and orders were filed.
2 A party ordered the written transcript which was filed with the
3 Board.

4 From the foregoing, the Board having conferred, now issues these:

5 FINDINGS OF FACT

6 I

7 Lilyblad Petroleum, Inc. is a Washington corporation. The
8 company operates a facility at 2244 Port of Tacoma Road in Tacoma,
9 Washington. Mr. Glen Tegen is the majority owner of Lilyblad and has
10 been its president since 1975.

11 The facility discharges into public waters and operates under a
12 Wastewater/NPDES discharge permit No. WA-0038679 pursuant to the State
13 Clean Water Act, Chapt. 90.48 RCW. The facility also operates as a
14 TSD (treatment, storage and disposal) facility as that term is used in
15 Chapt. 70.105 RCW, the state dangerous waste law.

16 II

17 The Department of Ecology ("Ecology") is a state agency
18 authorized to assess wastewater discharge annual fees to collect
19 expenses for issuing and administering wastewater discharge permits.
20 Chapt. 90.48 RCW and Chapt. 173-224 WAC. Under the permit fee
21 program, Ecology has categorized the Lilyblad facility as an
22 Industrial Facility, Organic Chemicals Manufacturing, Aliphatic, with
23 a \$10,000 fee assessment. Lilyblad has appealed this categorization.
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III

In October 1975, an NPDES/wastewater discharge permit was issued to Lilyblad as a bulk distributor of petroleum products. The permit governed stormwater discharges. Sanitary wastes were and are to be discharged to the City of Tacoma sewer system. Lilyblad subsequently applied for a renewal of its discharge permit. On January 12, 1981, Ecology stated that since Lilyblad's application letter stated there had been no changes in production or treatment, a final determination was not needed at that time. Ecology informed the company that the permit remained in effect until further notice.

In March 1988, Lilyblad filed with Ecology a wastewater/NPDES application ("Application") for two million gallons per day of stormwater runoff to be discharged through an outfall into waters of the state, i.e. the Lincoln Ditch which in turn flows into Blair Waterway in Puget Sound. [Exh. R-2].

It is undisputed that by the April 1991 hearing before this Board, a new wastewater/NPDES discharge permit had not been issued to Lilyblad for its Tacoma Road facility.

IV

On July 23, 1991, Ecology notified the company that under the wastewater permit fee program the facility was categorized as Industrial Facilities, Organic Chemicals Manufacturing, Aliphatic, and the company was billed accordingly. In November 1991 Lilyblad sent Ecology a letter questioning the category and the billing.

1 In early January 1991, Ecology sent a second billing, using the
2 same category as before. On January 25, 1991, the company filed an
3 administrative appeal with Ecology pursuant to WAC 173-224-100. The
4 company filed an appeal with the Pollution Control Hearings Board on
5 January 24, 1991, which became PCHB No. 91-19. On March 19, 1991,
6 Ecology issued a notice affirming that the previous categorization.

7 V

8 When Lilyblad filed its March 1988 a wastewater/NPDES application
9 with Ecology, the company attached a copy of its dangerous waste
10 permit application.

11 In the dangerous waste application the company identified itself
12 as the storage facility for hazardous waste, and described its
13 business as:

14 Petroleum and Chemical Distribution
15 Solvent Recycling and Hazardous Waste Storage

16 In Form 2C of that application, the company explained that it recycles
17 waste oil and that xylene, metals and BETX (which includes benzene)
18 are components of waste oil.

19 In this application the company listed its processes as:

20 One recycling unit;
21 Washex Distillation Unit - Recycles Mineral spirits only.
22 Approximately 350 GPH production rate;
23 Drum and container storage.

24 The company further listed its dangerous waste processes as:

25 Decantation
26 Distillation

1 Blending
2 Filtration
3 Degradation
4 Burner and Marketer

5 VI

6 Petroleum products, lubricating oils and solvents contain
7 aliphatic chemicals.

8 "Aliphatic chemicals" are organic chemicals which have a linear
9 structure, with the electrons of the carbon atoms not shared. In
10 contrast "Aromatic chemicals", which are also organic chemicals, have
11 shared electrons and a circular structure.

12 VII

13 At the Lilyblad facility a number of processes are done with
14 materials which contain aliphatic chemicals. The company accepts
15 different lubricants and blends them together to make a more
16 marketable product. The product may be heated to increase the
17 viscosity. This is done in an open-top vessel.

18 Mineral Spirits, a type of solvent, are recycled on-site. The
19 material prior to recycling had been used to clean and degrease
20 parts. Lilyblad separates out the rocks, metal, oil, water and
21 grease. Some steps in this process include decantation of the
22 material, allowing it to settle out into three phases: aromatics and
23 solvents on top, next the water phase (also contaminated), and lastly
24 the contaminated sludge and oils (containing aliphatic chemicals).

1 Lilyblad does low temperature distillation to further separate the
2 components. The clean solvent is either sold "as is" or sold after
3 blending. At the time of the hearing Lilyblad was still recycling
4 Mineral Spirits.

5 There is no evidence that gasoline blending is done on-site.
6 Apparently blending occurs off-site when Lilyblad tanker trucks load
7 at refineries.

8 VIII

9 The Lilyblad 1988 wastewater/NPDES Application included an
10 analysis of the facility's discharge (effluent).

11 Analysis done in 1989 reveals that the stormwater discharge
12 contained Aliphatic chemicals, including these wastes (see WAC
13 173-303-9903):

14 Extremely hazardous wastes:

15 Methylene chloride, at levels of 270-290 ug/L

16 Toluene, at 17-22 ug/L

1,1, 1-trichloroethane, at 11 ug/L

17 Dangerous wastes:

18 Acetone, at 2600-2700 ug/L

Methyl Ethyl Ketone (2-Butanone), at 250-260 ug/L

Isoprophylacetone (4-methyl-2-pentanone), at 270-300 ug/L

19 Evidence showed that when such chemicals are present in a
20 discharge, extensive Ecology effort is required to prepare for and
21 issue a wastewater discharge permit and to undertake compliance.

22 IX

23 During the hearing, appellant presented evidence that a different
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1 company, Associated Petroleum, is also a wastewater/NPDES discharge
2 permit holder. The company purchases Lilyblad products and blends
3 those products at its facility for resale. Ecology has categorized
4 the facility as Fuel and Chemical Storage under permit fee program, to
5 Chapt. 173-224 WAC. No evidence was presented that the Associated
6 Petroleum's facility recycles, distills, or decants aliphatic
7 chemicals. No evidence was presented that Associated Petroleum
8 discharges aliphatic dangerous or extremely hazardous wastes into
9 public waters.

10 X

11 Any Conclusion of Law deemed to be a Finding of Fact is hereby
12 adopted as such.

13 From these Findings of Fact, the Board makes these:

14 CONCLUSIONS OF LAW

15 I

16 The Board has jurisdiction over these parties and the subject
17 matter. Chaps. 43.21B and 90.48 RCW. The Board decides this matter
18 de novo.

19 II

20 The fee legislation was enacted in 1989. At RCW 90.48.465(1) the
21 statute directs Ecology to establish annual fees to collect expenses
22 for issuing and administering each permits, including wastewater
23 discharge/NPDES permits.

1 That section states in pertinent part:

2 ... All fees charged shall be based on factors
3 relating to the complexity of permit issuance and
4 compliance and may be based on pollutant loading and
5 toxicity and be designed to encourage recycling and the
6 reduction of the quantity of pollutants. Fees shall
7 be established in amounts to fully recover and not to
8 exceed expenses incurred by the department in
9 processing permit applications and modifications,
10 monitoring and evaluating compliance with permits,
11 conducting inspections, securing laboratory analysis
12 of samples taken during inspections, reviewing plans
13 and documents directly related to operations of
14 permittees, overseeing performance of delegated
15 pretreatment programs, and supporting the overhead
16 expenses that are directly related to these
17 activities.

11 III

12 In response to the legislation, Ecology adopted regulations at
13 Chapt. 173-224 WAC. The permit fee schedule, at section -040, lists
14 industrial facility categories and the respective fees. The facility
15 categories in contention in this case are:

16 Fuel and Chemical Storage Fees \$1,000 to \$5,000 (depending
17 on volume);
18 Organic Chemicals Manufacturing Aliphatic \$10,000;
19 " " " Aromatic \$15,000; and
20 Facilities Not Otherwise Classified \$500 to \$15,000 (depending
21 on volume).

22 WAC 173-224-040(1)(a) requires that facilities which operate
23 within several fee categories, be charged the highest category or
24 subcategory.
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IV

There is no dispute that Lilyblad in some way handles aliphatic chemicals. In addition, its stormwater discharge contained aliphatic chemicals, including extremely hazardous and dangerous wastes.

A key issue is whether there is "Organic Chemicals Manufacturing Aliphatic" on-site. Appellant contends the term only applies when aliphatic chemicals are first manufactured. Such a process occurs at petroleum refineries.

Neither Chapt. 90.48 RCW nor Chapt. 173-224 WAC defines the term, so we turn to the dictionary:

1. the making of goods and articles by hand or esp., by machinery, often on a large scale and with division of labor 2. anything so made; manufactured product 3. the making of something in any way, esp. when regarded as merely mechanical --vt. -tured, turing [...] 2. to work (wool, steel, etc.) into usable form.
Webster's New World Dictionary, Second College Edition.

At the Lilyblad facility, blending, decantation, distillation and recycling of aliphatic chemicals is done. Machinery is used. From products and waste materials containing aliphatic chemicals, final aliphatic products are made for sale. Materials which are waste are turned into useable form.

We conclude that Lilyblad is engaging in "chemicals manufacturing aliphatic." WAC 173-224-040. Appellant's proposed definition is not only more narrow than provided by the dictionary, it is not in harmony with the regulatory framework. The wastewater permit

1 regulatory effort for this facility is complex. See Finding of Fact
2 VIII, above. Moreover, there is already a separate classification for
3 petroleum refineries.

4 Classifying the Lilyblad facility as "chemicals manufacturing
5 aliphatic" is consistent with the statutory mandate. RCW
6 90.48.465(1). We conclude Ecology's decision was correct.

7 V

8 Appellant also contends the fee decision is a modification of the
9 wastewater/NPDES permit. Therefore, according to appellant, the
10 permit's General Condition applies requiring notice and opportunity for
11 hearing before permit modification.

12 We do not agree. The fee program is a separate program designed
13 to recover the costs of the wastewater permit program. The fee
14 categorization action did not modify permit conditions.

15 VI

16 Appellant has also raised some constitutional issues. The Board
17 is without jurisdiction over constitutional matters, except for those
18 involving evidentiary objections (see RCW 34.05.452).

19 We nonetheless observe the following. Appellant contends due
20 process was not accorded by the fee determination proceedings before
21 the Department of Ecology. Appellant misapprehends when and where
22 procedure for due process is required for actions under Chaps. 90.48
23 and 43.21B RCW. The Pollution Control Hearings Board's de novo
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1 proceeding provides such protection. The Board is an independent,
2 quasi-judicial entity. The parties have full opportunity to make
3 discovery, to examine witnesses under oath, to introduce documentary
4 evidence, to make argument, and so forth.

5 Appellant also raises an equal protection argument regarding the
6 Associated Petroleum facility. We observe that appellant has not
7 demonstrated the Associated Petroleum facility is similarly situated.
8 See Finding of Fact IX, above.

9 Appellants other arguments are without merit.

10 VII

11 Any Finding of Fact which is deemed a Conclusion of Law is hereby
12 adopted as such.

13 From these Conclusions of Law, the Board enters the following:
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ORDER

The Department of Ecology's categorization of the Lilyblad facility at 2244 Port of Tacoma Road as Industrial Facility, Organic Chemicals Manufacturing, Aliphatic, pursuant to Chapt. 173-224 WAC for wastewater discharge permit fee purposes, is AFFIRMED.

DONE this 12th day of June 1991.

POLLUTION CONTROL HEARINGS BOARD


JUDITH BENDOR, Chair and Presiding


HAROLD S. ZIMMERMAN, Member

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